



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: B-222485

July 11, 1986

File: Blue Cross and Blue Shield of Virginia

Date:

1. General Accounting Office (GAO) will consider untimely protest issues on the merits where issues are before a court of competent jurisdiction and court has expressed interest in a GAO decision.
2. Allegation that contract award for the delivery of mental health services violates Congressional mandate to reduce costs because awardee's proposed price exceeds agency's current costs for these services is without merit where authorizing legislation for this program contains no requirement that contract price be limited in such a manner.
3. Agency did not abuse its discretion by awarding contract to a firm that did not comply with state licensing requirements for insurance companies since offeror's failure to comply with state and local licensing requirements is a matter between the offeror and state and local officials which does not affect the legality of the award.
4. General Accounting Office (GAO) will not reevaluate proposals or substitute its judgment for that of agency evaluators who have considerable discretion. Rather, GAO will examine record to determine whether agency judgment was reasonable and in accord with evaluation criteria.
5. Award to higher-priced, technically-superior offeror is not objectionable where solicitation states that technical considerations are significantly more important than price.

Blue Cross and Blue Shield of Virginia (Blue Cross) protests the award of a contract to Alliance Alternative Delivery Systems Corp. (Alliance) under request for

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proposals (RFP) No. MDA906-85-R-0008 issued by the Office of the Civilian Health and Medical Program of the Uniformed Services (OCHAMPUS), Department of Defense. The RFP was issued to obtain an alternate approach for the delivery of comprehensive mental health services for all OCHAMPUS-eligible beneficiaries in the Tidewater area of Virginia. Blue Cross argues that the award to Alliance, the higher priced, higher technically rated offeror, violated the authorizing legislation for this program which was to assist OCHAMPUS in reducing costs. Also, Blue Cross contends that Alliance's proposal should have been rejected because Alliance was not licensed as an insurance company under Virginia state law at the time it submitted its offer. In addition, Blue Cross argues that OCHAMPUS misapplied the technical and cost evaluation criteria contained in the RFP.

We deny the protest.

Subsequent to filing this protest, Blue Cross filed suit in the United States District Court for the Eastern District of Virginia (Civil Action No. 86-0374-R). By order dated June 25, 1986, the court requested that our Office consider the protest. While we find that some of the issues raised by Blue Cross are untimely, we nonetheless consider them in view of the court's interest. See Freedom Industries, Inc., B-212371, Nov. 28, 1983, 83-2 CPD ¶ 617.

Under 10 U.S.C. § 1092(a) (Supp. III 1985), OCHAMPUS is authorized ". . . to conduct studies and demonstration projects on the health care delivery system of the uninformed services with a view to improving the quality, efficiency, convenience and cost effectiveness of providing health care services . . . to members and former members and their dependents." The current RFP was issued under this authority and is considered an "at risk" demonstration project since it requires the contractor to provide all required services without any adverse effect on beneficiaries, at a firm, fixed price. The contractor is responsible for either providing the care through contracted providers or for paying for the care provided by noncontracted providers. It is expected that the contractor will utilize a case management system to ensure that the appropriate level of care is being provided and to reduce unnecessary services. The contractor will attempt to shift the delivery of mental health care services from more expensive hospital and residential treatment centers to less expensive hospitalization and outpatient settings.

Although OCHAMPUS indicates that reducing mental health costs is an objective, the RFP advised offerors that technical evaluation factors were significantly more important than price. The major evaluation factors, in descending order of importance, were listed as follows:

- a) Technical Approach
- b) Management Plan
- c) Personnel Resources
- d) Corporate Experience

Technical approach was identified as being significantly greater in importance than the other factors. Offerors were advised that proposals must not merely offer to provide mental health services but that a "definite approach" in meeting the government's requirements must be submitted.

The RFP was issued on June 17, 1985 and a preproposal conference was held. Five amendments to the RFP were subsequently issued and five proposals were received by the closing date for receipt of offers. Evaluations were conducted by a separate Source Selection Evaluation Board (SSEB) and Business Proposal Evaluation Team (BPET) and after the initial evaluation, all five offerors were considered within the competitive range. Four of the five offerors responded to the agency's request for best and final offers and on February 3 through 7, 1986, the SSEB and BPET reevaluated the proposals. The results of this evaluation were reviewed by an executive review council which was responsible for making recommendations to the Source Selection Authority. Alliance was ranked first technically and remained first after OCHAMPUS factored in its proposed price. Blue Cross was ranked last technically but was ranked third overall because of its lower proposed price.

After a preaward survey, OCHAMPUS awarded the contract to Alliance on April 2 and Blue Cross' protest of the award was filed with our Office on April 11. Despite the pending protest, continued performance was authorized on April 18. See 31 U.S.C. § 3553(d)(2) (Supp. II 1984).

Statutory Requirements

Blue Cross argues that 10 U.S.C.A § 1092 was enacted to assist OCHAMPUS in holding down spiraling health care costs and that the award to Alliance, at a price which exceeds OCHAMPUS' current costs for these services,

violates this congressional mandate and constitutes an abuse of discretion. The protester argues that awarding the contract to an offeror whose price is higher than current costs makes a mockery of the Congressional directive.

Despite Blue Cross' assertion to the contrary, we find no statutory requirement that OCHAMPUS award this contract at a price lower than its current costs for providing these services. In this regard, we note that Blue Cross has quoted no language from the statute which arguably supports its position. Moreover, while the legislative history does indicate that Congress was concerned with escalating military health care costs, other factors were also to be considered in establishing such a demonstration project. S. Rept. No. 98-174, 98th Cong., 1st Sess. (1983). Section 1092(a)(1) lists cost effectiveness as only one of four areas Congress sought to improve in the military health care system and the quality, efficiency and convenience of health care services were also to be considered in establishing demonstration projects under this authority. Since Congress has not limited the contract price of any award made under section 1092, we conclude that an award which exceeds current costs is not at variance with the statute authorizing OCHAMPUS to contract for these services.

Compliance with License Requirement

Blue Cross argues that Alliance's offer should have been rejected because Alliance was not a licensed insurance company under Virginia state law at the time it submitted its proposal. The protester contends that the Virginia Insurance Code requires an insurance company to obtain a state license prior to engaging in any insurance business in the state and that Alliance's submission of a proposal under this RFP is tantamount to the conduct of insurance business. Although amendment No. 0003 to the RFP clearly stated that offerors need not be licensed prior to the submission of proposals but could obtain a license within 120 days of award, Blue Cross argues that Virginia law in this area is not preempted by federal law and that the RFP cannot be used to excuse a breach of state law. Blue Cross contends that OCHAMPUS' failure to follow state law is evidence of bad faith and constitutes an abuse of discretion.

We find the protester's position to be without merit. The failure of an offeror to comply with state and local

licensing requirements generally is a matter between the offeror and state and local officials which does not affect the legality of the contract award. 53 Comp. Gen. 51 (1973); 51 Comp. Gen. 377 (1971); see also Cadillac Ambulance Service, Inc., B-220857, Nov. 1, 1985, 85-2 CPD ¶ 509. This is so because government contracting officers, as a general rule, are not competent to pass upon the question of whether a particular local license or permit is legally required to perform a government contract and, for this very reason, the matter is made the responsibility of the contractor. Whether Virginia's particular requirements would apply to this contract and preclude Alliance from performing is a decision to be made by state authorities, and if Virginia subsequently determines that a license is required, the state may enforce its requirements, provided the application of state law is not in conflict with federal laws or policies or does not in any way interfere with the execution of federal powers. See Leslie Miller, Inc. v. Arkansas, 352 U.S. 187 (1956). Should Virginia's enforcement of its requirements eventually preclude Alliance from performing, Alliance then may be found in default and the contract terminated. The award itself, at this point, however, is not improper. 51 Comp. Gen. 377, supra.

Technical Evaluation

Blue Cross contends that the record fails to support the agency's technical evaluation of and contract award to a higher priced offeror. The protester argues that Alliance's proposed price was much higher and that the technical difference between the proposals was not sufficient to justify the additional cost.

Blue Cross also argues that its proposal was not fairly evaluated. OCHAMPUS rated Blue Cross' proposal unsatisfactory for failure to provide a description for developing and maintaining systems of records and failure to provide an explanation of how all systems were to be integrated. In addition, Blue Cross' proposal was rated less than satisfactory because it did not provide sufficient information regarding its overall organization and because its corporate experience was also considered less than satisfactory. The protester asserts that it provides extensive information in these areas which apparently was ignored by the agency. It points out that it has more than 50 years of relevant experience and asserts that its rating in this area is a glaring example of unfairness and constitutes an abuse of discretion. Blue Cross complains that OCHAMPUS has only provided selective disclosure of the agency's evaluation and argues that fairness requires that OCHAMPUS make a complete disclosure of its technical evaluation as well as Alliance's.

OCHAMPUS has not disclosed to the protester the actual technical scores of each offeror nor has the agency released Alliance's option year prices since the actual point scores are considered confidential and OCHAMPUS does not release option year prices prior to exercise of the option. OCHAMPUS argues that there were many deficiencies remaining in Blue Cross' best and final technical proposal and that the agency's source selection statement clearly supports the agency's conclusions. In addition, although Blue Cross did submit the lowest overall price over the potential contract period of 3 years, OCHAMPUS notes that technical factors were significantly more important than price under the RFP. OCHAMPUS indicates that it used a "best buy" analysis which factored in the respective weights for technical and price. Under this analysis, Alliance's proposal was ranked first overall while Blue Cross low price only increased its relative ranking from fourth out of four to third.

The determination of relative merits of a proposal, particularly with respect to technical considerations, is primarily a matter of administrative discretion, and the exercise of that discretion will not be disturbed unless it is shown to be arbitrary or in violation of the procurement laws or regulations. General Mgmt. Systems, Inc., B-214246, Sept. 25, 1984, 84-2 CPD ¶ 351. Our Office will not reevaluate technical proposals. Leo Kanner Assocs., B-213520, Mar. 13, 1984, 84-1 CPD ¶ 299.

Here, Blue Cross has a fundamental disagreement with OCHAMPUS concerning the adequacy of the information provided with its proposal. However, the protester's mere assertion that the agency ignored information contained in its proposal does not establish that OCHAMPUS' conclusions were unreasonable or arbitrary. OCHAMPUS determined that Blue Cross failed to provide sufficient information regarding its claim processing system, its organizational relationships between claims processing and case management, and failed to provide sufficient detail on its generalized approach to systems design. For example, Blue Cross failed to discuss anticipated problems from implementing a case management system and did not describe an approach for adding providers during the contract. OCHAMPUS noted that payment to providers was approximately 50 percent of current reimbursement rates with the remaining being paid from an incentive pool on a quarterly basis. There was concern that providers would drop from the project because of a cash flow problem and Blue Cross failed to discuss how it would attract and maintain

providers in sufficient numbers to perform the contract. Also, while Blue Cross indicated in its proposal that every facility under its management had experienced a drastic reduction in costs, Blue Cross did not provide sufficient information explaining how the quality of care was maintained with the lowered costs. In addition, there was no coordination between Blue Cross' claims processors and case managers and Blue Cross did not address the use of claims data in the case management system. We note that an agency's technical evaluation is dependent upon the information furnished in the proposal and the burden is clearly upon the offeror to submit a proposal that is adequately written. Although the protester characterizes the information it submitted as extensive, we find the record reasonably supports the agency's conclusions.

In addition, our review of the record provides no basis to conclude that the evaluators were unfair or arbitrary in their assessment of either firm's proposal. Concerning the evaluation of its corporate experience cited by Blue Cross as a glaring example of unfairness, we note that this contract is a demonstration project which called for a creative nontraditional approach to the provision of mental health services. Blue Cross' abundant claims processing experience was not considered directly relevant to this type of project in which case management was emphasized. Furthermore, the record shows that the same standards were utilized by OCHAMPUS in evaluating the corporate experience of all the offerors.

Overall, OCHAMPUS concluded that Alliance had significant experience working cooperatively with the military and their dependents and that Alliance proposed a superior case management system which would result in a significant reduction in the cost of providing mental health care to OCHAMPUS beneficiaries. Our review of the record shows that OCHAMPUS followed the evaluation scheme set forth in the RFP in making this determination and, while Blue Cross disagrees with the scoring of its proposal in certain areas, we cannot conclude that the evaluation lacked a reasonable basis.

With respect to Blue Cross complaint that award was improperly made to the higher priced offeror, we point out that the agency was not required to make award on the basis of low price. The RFP provided that price would not be controlling and indicated that technical concerns were significantly more important than price. In light of the difference in technical merit between the Blue Cross and

Alliance proposals, we see no basis to object to the agency's award decision.

Concerning Blue Cross' allegation that the agency selectively disclosed information concerning its evaluation, OCHAMPUS did provide Blue Cross with a summary of the evaluation of its best and final offer. In addition, we note that the relevant documents related to the evaluation process were made available for our review. To the extent the protester contends that it also should receive access to these documents, its sole recourse is to pursue the remedies provided under the Freedom of Information Act, 5 U.S.C. § 552 (1982). See RCA Service Co., B-219636, Nov. 4, 1985, 85-2 CPD ¶ 518.

Finally, we note that Blue Cross contends that OCHAMPUS delayed scheduling a debriefing in this matter in order to delay the filing of a protest and that OCHAMPUS was not forthcoming with information concerning Blue Cross' alleged deficiencies. There is no evidence that OCHAMPUS intentionally delayed the debriefing in this case and, in any event, this allegation, as well as the contention that the debriefing was inadequate, are procedural matters which do not affect the propriety of the award. Systems Research Laboratories, Inc., B-219780, Aug. 16, 1985, 85-2 CPD ¶ 187.

The protest is denied.

for *Seymour Efron*
Harry R. Van Cleve
General Counsel



UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

OFFICE OF GENERAL COUNSEL

B-222485

July 11, 1986

The Honorable Richard L. Williams
United States District Judge
United States District Court for
the Eastern District of Virginia

Dear Judge Williams:

The enclosed decision responds to the court's June 25, 1986, request for an advisory opinion from this Office in the matter of Blue Cross and Blue Shield of Virginia v. United States of America and Alliance Alternative Delivery Systems Corporation, Civil Action No. 86-0374-R.

Sincerely yours,

for *Raymond E. Evans*
Harry R. Van Cleve
General Counsel

Enclosure